



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr P Szych

v

Costa Limited

Heard at: Watford

On: 28, 29, and 30 January 2019

Before: Employment Judge Andrew Clarke QC

Members: Miss A M Telfer

Mr R Lesley

Appearances

For the Claimant: In person

For the Respondent: Mr M Foster, Solicitor

JUDGMENT

The claims of direct race discrimination, direct disability discrimination and harassment are dismissed.

REASONS

1. The claimant brought his claim on 10 April 2018 alleging race and disability discrimination. A preliminary hearing was held before Employment Judge Bartlett on 29 June 2018 at which three issues were identified as being issues in the case and an order was made that the claimant fully particularise any other allegations of race or disability discrimination which he intended to bring. Those particulars were provided in an email to the tribunal of 25 July 2018. Further particulars were given in response to an Unless Order. They were provided by an email of 12 November 2018, but a perusal of that email and the earlier email of 25 July shows that the issues identified in November were all of them identified in the earlier email. The respondent consequentially reamended its response having had the claim particularised.
2. The name of the respondent is changed from Whitbread Group Plc to Costa Limited by agreement between the parties and consequent upon a TUPE transfer.

3. At the commencement of this hearing a list of issues was agreed with the claimant. The 12 issues in the case are as set out below. Save where otherwise stated the allegation is one of direct race discrimination. The issues are as follows:
 - 3.1 Ms Brown unfairly blaming the claimant for issues arising at the Luton Arndale Centre store in the period October to November 2017.
 - 3.2 Ms Brown saying bad things about the claimant to others up to the end of February 2018.
 - 3.3 Ms Brown ignoring the claimant and failing to be acknowledging him when he said "Hi" in the period October to November 2017.
 - 3.4 Ms Brown and Mr Johnson not seeking to resolve the claimant's dispute with Adelaide Jephson, a British co-worker. The incidents leading to the dispute took place in about July 2017 but the claimant relies upon his complaints in respect thereof up to November 2017.
 - 3.5 Leaving the claimant's fit notes on a desk (or in a desk drawer) where they were available for all to see. This relates to fit notes submitted in the period January to March 2018.
 - 3.6 Not paying the claimant's Statutory Sick Pay on time. This relates to the period December 2017 to March 2018.
 - 3.7 Mr Johnson not visiting the Luton store in the period August to November 2017 so as to avoid the claimant. This is also said to be an allegation of harassment on the ground of the claimant's race.
 - 3.8 The cancellation by Ms Sergi of a transfer for the claimant from the Luton store to a Stevenage store which the claimant alleges was because of his ill-health and/or because of what Ms Sergi was told by Ms Brown and Mr Johnson about him. This took place in December 2017.
 - 3.9 Ms Brown's failure to set up fit notes on the respondent's systems in January and February 2018 which led to his Statutory Sick Pay being delayed. This is an allegation of direct disability discrimination only.
 - 3.10 The sending by Ms Brown in February 2018 of three letters to the claimant threatening disciplinary proceedings if the claimant did not submit fit notes. Again, this is said to be an allegation of direct disability discrimination only.
 - 3.11 The making by Ms Brown on 27 February 2018 to two colleagues of disparaging remarks regarding the claimant on a WhatsApp group chat. This is said to be an act of discrimination arising from the claimant's disability and/or an act of harassment.

4. On behalf of the claimant we heard evidence from the claimant himself, from his partner (Peter Williams) which evidence went mainly to events in relation to employment by the same respondent but at the Warrington store which matters are not directly the subject of this claim, and his sister, Ms Sandra Szych (whose evidence mainly concerned the issue of the submission of fit notes). The claimant also relied upon two witness statements the first from Ms Chelsey-Clare Loveridge and the second from Ms Agnieszka Kisczynska. Both of those witness statements were prepared by the claimant in a question and answer format and are unsigned. Neither witness attending the tribunal, no cross examination was possible. In all of the circumstances we have attached little weight to that evidence.
5. On behalf of the respondent we heard from Mr Steven Johnson, the Area Manager, responsible for the claimant's store, Ms Daniella Sergi, the Manager of another store in Stevenage, and Ms Rachel Golby, an Area Manager who conducted the grievance appeal.

Findings of fact

6. The claimant is a Polish national who moved to England in mid 2013. He immediately got a job working for the respondent and became an Assistant Manager. There is a short break in his employment which is immaterial for present purposes. He predominantly worked at a branch in Luton at the Arndale Centre. He briefly worked at the Stevenage branch in circumstances set out below. It is admitted by the respondent that from 1 January 2018 the claimant was disabled for the purposes of the Equality Act 2010, due to depression. He was absent from work for a long period of time from late 2017 onwards. He then moved, together with his partner, to the Warrington store.
7. Initially the Luton store was managed by a Ms Lisa McMullen. There was then a period of time during which the branch had no manager and the Assistant Managers effectively covered the branch, supervised (latterly) by Ms Nicola Brown who was also then managing another branch. She later became the manager of the Luton branch. Mr Steven Johnson was the Area Manager for Beds and Hertfordshire with some 25 Store Managers reporting to him.
8. In March 2017 the claimant reported what he considered to be financial irregularities in the branch to Mr Johnson. Relations between himself and the then Manager deteriorated, but he does not allege any unlawful discrimination by her. From his evidence it is clear that he considered her, at least in part, responsible for the irregularities. Whether she was we have no way of knowing. However, it appears that she became ill and was signed off from work. The situation in the store deteriorated. It is clear that staff morale was low and staff performance suffered. The claimant tried to deal with this as an Assistant Manager but it would appear that his (and others') efforts had little impact.

9. In July 2017 the claimant arranged a staff meeting to address what he saw as branch failings. The meeting did not go well and ended with a staff member, Ms Adelaide Jephson, having a fierce argument with the claimant. Both wrote letters of complaint to Mr Johnson making serious accusations against each other, not only in relation to the meeting in question, but more generally. Ms Jephson, who was 16 at the time, complained about the claimant's conduct towards her, towards other staff members, towards customers and as regards the hours she was made to work without appropriate breaks. According to the claimant she is in some way related to Ms McMullen, the absent manager. As the matters were never properly investigated and we have heard limited evidence on the subject, we are unable to say either whether she was motivated to write by her relationship with Ms McMullen or whether what she said was true. What appears to us uncontroversial is that the branch was in a generally poor state and the Assistant managers, of whom the claimant was one, were unable successfully to address the problems. Neither complaint letter suggested that the nationalities of the branch staff played any part in these problems.
10. At about the same time another Polish member of staff (Agnieszka Kisczynska) wrote a lengthy letter to Mr Johnson complaining about the state of the branch and the claimant's "very harsh" attitude at the meeting referred to above. She did not suggest that nationality played any part in any of the problems.
11. Mr Johnson handed the matter of the two complaints to Ms Brown to investigate and resolve. She did not carry out any thorough investigation. He asked her to deal with the matter because she was an experienced manager who was to supervise the management of the store. She subsequently led Mr Johnson to believe that the situation was resolved and that the individuals were working together appropriately. In fact she had done next to nothing other than sought to manage the branch (alongside her existing one) and hope that the two individuals would put their differences behind them. It is clear from the letter referred to above and a further exchange between Mr Johnson and a relatively new employee, Ms Kim Sales, that problems remained. In her letter of 13 September 2017 Ms Sales complained about the claimant's rudeness towards her.
12. Having heard from the claimant and Mr Johnson, as well as his sister, having looked at the contemporaneous correspondence and the two witness statements provided by the claimant from the non-attending witnesses and also having regard to Mr Sergi's evidence concerning the claimant's time at Stevenage, we are satisfied that some staff members found the claimant's way of managing them to be both confrontational and unhelpful. The Luton Branch was poorly run and in a generally poor state by the autumn of 2017.
13. Ms Brown was seeking to manage it, along with another branch and Mr Johnson was providing some limited supervision for her and other branch staff, but the situation was not significantly improving.

14. The claimant alleges that Ms Brown unfairly blamed him for various problems at the branch in October to November 2017. His evidence in this regard was vague. We consider that his failings as a manager did contribute to the poor state of the branch. We have not heard (from him or others) specific evidence of specific matters for which he is said to have been blamed, whether unfairly or not.
15. The claimant alleges that Ms Brown ignored him and did not respond when he said "Hi" to her in the autumn of 2017. He asserted that her attitude towards him changed after exchanges in August and September 2017 regarding his request for a pay rise. It is common ground that at this time Ms Brown would only visit the store for an hour or two on one or two days a week. It was, as we have found, clearly in a poor state and the letters to Mr Johnson referred to above show that when she attended the store Ms Brown was having to take over tasks from others because they could not perform them, such as closing a till. Given the state of the branch and the demands on her, we are unsurprised that she did not react favourably to the claimant's request for a pay rise and may have appeared to be ignoring him as she tried (largely, it would appear, unsuccessfully) to deal with the branches problems. Ms Brown took over as Manager of the branch (in the sense of relocating to it at least for a substantial period of her working week) on 9 November 2017. On that day the branch was inspected by internal Costa staff and received a very low score. It appeared that staff needed basic training, that the store needed a deep clean and that standards overall were very low. We accept that Ms Brown was under great pressure when she took over the store and we note that she suffered from bi polar disorder and, in the spring of 2018, became ill and eventually left the respondent's employ.
16. The claimant also alleges that Mr Johnson made no visits to the Luton branch from late August to late November 2017 and that this was because he wished to avoid meeting the claimant and having to deal with his (the claimant's) issues. In his grievance proceedings he had raised a similar complaint, but based it on the period from April 2017 onwards. The claimant now says that he had relied upon the wrong period in his grievance. We note that he persisted with that allegation when interviewed on the specific point in March 2018. We are satisfied, by reference to his expense claims and his oral evidence, that Mr Johnson did visit the branch on at least nine occasions in the period in question and would typically visit branches one a month on average. Hence, he would appear to have visited this branch more frequently than he would typically visit others. The documents before us also show that the claimant and Mr Johnson communicated regularly by text or WhatsApp message and the claimant could and did call and email Mr Johnson. In our opinion Mr Johnson was not avoiding the claimant and the claimant never suggested that he was until he raised his grievance, when he (as he now says) got the period wrong.
17. By late November 2017 the claimant was unhappy at the Luton store and wanted a transfer. He spoke to Ms Brown about this. She in turn spoke to

another manager, Ms Sergi, who was about to take over the Stevenage store. Ms Sergi needed an Assistant Manager and agreed to consider the claimant. She was running another store at the time, but Stevenage was well below strength and needed staff. So, the claimant went to work there. If all went well the intention was that he would transfer permanently.

18. Having heard Ms Sergi's evidence and having heard her cross examined, we are satisfied that she was a forthright and honest witness. When the claimant initially came to the Stevenage store she was not present. According to her staff all did not go well. The claimant was, so they told her, rude both to them and to customers, taking excessive cigarette breaks and generally untidy in his behaviour and appearance.
19. It is the claimant's case that we reject that evidence. It appears to us illogical. It is common ground that relations between Ms Brown and the claimant were not good at this stage and it is the claimant's case that Ms Brown wished to get rid of him. She recommended him for a transfer to Stevenage. In those circumstances it appears to us unlikely that she would have bad-mouthed him to Mr Sergi in such a way as to be likely to cause the transfer to fail. In any event, we accept Ms Sergi's evidence that this did not take place.
20. As we have already found, when Ms Sergi went to the branch she received bad reports from the staff about the claimant. However, it was not her habit to take what others said at face value and she determined to see for herself. She worked with the claimant and spoke to the claimant about his work. She found him unresponsive, smirking in response to comments that she made to him, she found his appearance poor (including his trousers being torn) and that he seemed most concerned about what others might have told her, she telling him that they had not told her bad things about him. She was still determined to make up her own mind and wished to give him a chance, not least because she was desperate for staff for the branch she had just taken over. However, shortly after she first worked with the claimant and first discussed matters with him, he began a series of absences. The first was due to a car accident, the second due to the death of a family member and, finally he was absent because of food poisoning. He provided a fit note which indicated that he would not return to work before the new year. It was imperative for Ms Sergi that she had extra staff in the branch to cover for what was its busiest period in and around Christmas. Staff were already struggling in a less busy period. She had an available number of hours which she could fill either with an Assistant Manager (as was her preference) or with more junior staff. Time was short. She engaged more junior staff. Hence, she brought the claimant's potential transfer to an end because she no longer had space for him and he was not available at the time when she needed him. We are satisfied, as she told us, that even if he had appeared in the period that she worked with him to be the most marvellous Assistant Manager, she would still have taken the decision she did given his absence over the Christmas period.

21. The claimant returned to the Luton branch, but was off sick and remained off sick until he eventually transferred to Warrington. As we have noted, the respondent accepts that he was disabled for the purposes of the 2010 Act from 1 January 2018 onwards.
22. On 29 January 2018 the claimant lodged a written grievance. This contained seven allegations. The first four relate to matters already dealt with in our findings above. The fifth relates to the failure appropriately to process the claimant's sick pay from a period which extended during the consideration of the grievance to be from 14 December to 11 March. The sixth allegation was a general allegation of race discrimination. The seventh allegation concerned whether or not Ms Brown knew that the claimant had raised a complaint about her before she was interviewed as part of the formal grievance process and seems to us irrelevant to matters that we have to consider.
23. With regard to the payment of Statutory Sick pay, it is clear that payment depends upon the receipt by the respondent of an appropriate fit note. In the event that the claimant (or any other member of staff) being absent without an appropriate fit note, then they cannot be marked in the store records as sick and their absence will lead to the sending of a standard form absence letter which encourages contact and warns of possible disciplinary sanctions in the event that the absence is not appropriately explained.
24. If a fit note is received "late" (ie, after the commencement of the period which the fit note covers) then the store cannot record the individual as fit for the already past dates if the week in which those dates appear has ended. In those circumstances the branch records are "locked". Then, it is necessary for the manager to contact the external payroll provider who can make appropriate entries on the payroll system which it maintains on behalf of the respondent. In those circumstances there is a likelihood of a delay in payment. If that payroll system is itself in lockdown due to the fact that the payroll is about to be run, then the delay in payment will be greater.
25. The claimant consistently submitted his sick notes late. Hence, his pay was delayed.
26. The payroll provider requires written instruction in order to amend the pay records which it maintains on behalf of the respondent. Hence, if a branch Manager were to telephone and inform that body of the existence of a late submitted fit note, they would be asked to submit an appropriate email to confirm the details.
27. We are satisfied that the claimant was treated in exactly the same way as anybody else would have been treated with regard to late fit notes. In other words, that could lead (and did) to the above procedure being followed and payment being delayed when compared to when payment would ordinarily have been made had the claimant been working. Furthermore, the late submission of the fit notes led, in three instances, to the letters of the kind referred to above being sent to the claimant.

28. On one occasion in January 2018, Ms Brown failed to send the written confirmatory email to the payroll provider having telephoned them. This led to a delay in payment to the claimant. We are satisfied (as were those who considered the grievance and the grievance appeal) that this was accidental. As we have already noted Ms Brown was at this time under significant pressure. She did follow the system correctly on several subsequent occasions.
29. The letters sent to the claimant asked him to contact the respondent and suggested meetings should take place. No meetings were arranged, it is not necessary for us to resolve why this was. However, we note that the claimant was not treated less favourably in this regard than someone who was either British or not disabled would have been treated.
30. The claimant makes two complaints about the conduct of his grievance. Firstly, he complains that the consideration of the grievance was delayed. Secondly, he asserts that the consideration of the grievance was approached with a closed mind. In considering both of those matters we keep in mind that we have not heard from the person who conducted the grievance, as distinct from the person who conducted the grievance appeal.
31. It is correct that there was a significant period between the submission of the grievance and the provision of the grievance outcome in writing. The grievance was submitted on 29 January and the grievance outcome letter sent on 9 May 2018. We are satisfied that the investigation of the grievance did not start promptly because Ms Brown was off sick. She was seen on her return. She was interviewed twice, as was the claimant and five others (including Ms Sergi) were interviewed once. We are satisfied that the delay was occasioned by the absence of Ms Brown and by the need for a detailed consideration of the matters alleged by the claimant.
32. The grievance outcome letter consists of over nine closely typed pages. Each allegation is considered in detail and a clear reasoned decision reached. There is a finding in the claimant's favour on one aspect with regard to the delay in payment of Statutory Sick Pay for the period in January referred to above.
33. In our view the grievance outcome letter (and the notes of the various interviews) show that this matter was thoroughly considered and careful findings reached. We note that on appeal the matter was very thoroughly re-examined and additional findings were made in the claimant's favour, in particular in relation to Ms Brown's failure adequately to deal with the complaints made both by the claimant and by Adelaide Jephson. However, the fact that a different investigator, in effect starting from scratch, reached different conclusions on some aspects of the matter, does not appear to us to evidence any pre-disposition to find against the claimant by the person who first considered the grievance. On the contrary, the evidence that we have seen appears to us to suggest a very thorough and open-minded consideration of matters at the grievance stage.

34. The grievance appeal also considered a series of WhatsApp exchanges involving Ms Brown, Ms Loveridge and Ms McMullen (who had now returned from sick leave, but as an Assistant Manger). Those exchanges are in February and early March 2018. The claimant's complaint relates to the exchanges in February, but we have looked at all of the exchanges.
35. The WhatsApp group was created by Ms Brown and joined by the other two on their private mobile phones. Nevertheless, it is clear that the intention of the WhatsApp group was to facilitate improvements in the running of the branch.
36. During the course of the WhatsApp exchanges on 27 February, Ms Brown noted that the claimant was off sick, that he was in breach of the Sickness Policy and that he had raised a grievance against her. Ms McMullen refers to him as "A bully" and being "unprofessional". In response, Ms Brown notes that she considered that he was digging a hole for himself by his behaviour, but that she would simply take advice and follow procedures. In early March Ms McMullen noted that the claimant had handed in another sick note, to which Ms Brown's response was that she did not believe that he would come back until his complaint (ie his grievance) had been dealt with. The claimant confirmed in evidence that that was indeed the case.
37. We have no doubt, as Ms Golby found when considering the grievance appeal, that these exchanges were inappropriate for a manager. There is no suggestion in these exchanges that any of the individuals concerned resented the claimant because of his Polish nationality and whilst the references to his sickness might be said to show a lack of sympathy, we consider (looking at all of the material before us, including the notes of the grievance interviews) that these individuals would have so treated anyone absent sick (or absent for any other reasons) whether disabled or not whom they did not like and it is quite clear that Ms McMullen (in particular) did not like the claimant and the way that he behaved towards her.
38. Finally, we turn to where fit notes submitted by the claimant were kept in the branch. We are satisfied that whether they were in a drawer or on a bench, they were not put somewhere which was private. There is no evidence to suggest that this way of handing fit notes was one chosen just for the claimant's fit notes. The evidence is that there were few fit notes submitted to the branch other than his. However, his sister could not tell us what had been done with her fit notes when she was sick in late 2017. The claimant suggested that the fit notes should have been kept confidential and he is quite right. However, we accept (as Ms Loveridge told the grievance hearing) that the claimant's state of health was discussed by staff because the claimant's sister told them the details of what was wrong with the claimant. In the relative chaos that was the Luton Store, we are satisfied that this would be the way in which all fit notes were dealt with regardless of nationality or reason for absence. It is a deplorable way in which to handle what should be a confidential document, but we are satisfied that that is the way in which fit notes would have been treated generally.

39. Having received the outcome of his appeal in relation to the grievance and still off sick so far as the Luton store was concerned, the claimant eventually moved to the Warrington store. From his evidence it is clear that strikingly similar problems seem to have arisen at the Warrington store to those which he says arose at the Luton store. However, we have not heard detailed evidence in respect of those matters and we make no findings in respect of them.

The Law

40. The claimant alleges direct discrimination on the grounds of two protected characteristics, race and disability. He also alleges discrimination arising from a disability and harassment.
41. We have had regard to the provisions of s.13 of the Equality Act (which defines direct discrimination) to the provisions of s.15 (dealing with discrimination arising from disability) and s.26 (which defines harassment). It is unnecessary for us to set out the text of those sections in these reasons.
42. We have also had regard to the provisions of s.136 of the 2010 Act. In that regard we have reminded ourselves that a burden to explain falls upon a respondent where the claimant has provided evidence, which we have accepted, from which we could conclude that unlawful discrimination had been established. It is not enough that the claimant establishes disparate treatment or that he establishes unfavourable treatment, he must also produce evidence from which we could conclude that the reason for the treatment in question related to the relevant protected characteristic.
43. As to direct discrimination, there is no dispute between the parties that:
- 43.1 The employment tribunal must be satisfied on the balance of probabilities that the respondent has treated the claimant less favourably than it would have treated others in similar circumstances, but who lack the protected characteristic in question and that the disparate treatment was related to that characteristic (the “something more” referred to by the Court of Appeal in Madarassy v Nomura Plc [2007] IRLR 246).
- 43.2 This is a comparative exercise, but a hypothetical comparator may be relied upon, as here.
- 43.3 The test is objective. It is not enough that the claimant feels that he has been less favourably treated because of his race or disability.
- 43.4 Where s.15 is concerned the exercise is not one of comparison, it is enough to establish “unfavourable” treatment, but that treatment must be because of the claimant’s disability. The perpetrator in those circumstances will not be liable if they did not know and could not

reasonably have been expected to know that the claimant had the disability in question (see sub section (2)).

- 43.5 An employer can be liable for the acts of its employees and will be so liable if the act was done in the course of employment unless the statutory defence in s.109(4) is made out. Here, no reliance is placed on that statutory defence. Lack of knowledge or approval by the employer of activities in the course of employment is no defence in itself (see s.109(3)).

Application of the law to the facts

44. We will consider each of the alleged acts of discrimination in the succeeding paragraphs. In arriving at our conclusion, we have been careful to stand back when considering each individual allegation so as to look not only at the facts directly relevant to it, but to the background as a whole and to see whether that or the facts (and preliminary conclusions reached) relevant to the other allegations might shed light upon the allegation in question.
45. We turn first to the allegation concerning Ms Brown unfairly blaming the claimant for issues at the branch in the period October to November 2017, an act of direct race discrimination.
- 45.1 The claimant's case in this regard is vague. We have set out our findings in respect of the relevant period in late 2017 above. It is a period during which (until 9 November) Ms Brown had little contact with the claimant, who was (on his own case) still in effective day-to-day control, at least for period of time, of a branch with very significant problems which he had not been able satisfactorily to address.
- 45.2 The claimant has not satisfied us that there were instances of his having been unfairly blamed for particular problems.
- 45.3 Looking at the totality of the evidence regarding the problems at the store up to the end of November 2017, when the claimant moved to Stevenage, we consider that Ms Brown treated the claimant no differently than she would have treated a British Assistant Manager in his situation. There were clear failings on Ms Brown's part as regards the investigation of the claimant's and Ms Jephson's complaints, but we are satisfied that his race played no part in this. We shall deal with this in more detail below.
46. Next, we turn to the alleged bad mouthing of the claimant by Ms Brown up to the end of February 2018, again an allegation of direct race discrimination.
- 46.1 There are two particular instances of Mr Brown allegedly saying bad things about the claimant to others. First, to Ms Sergi in November

and December 2017 and, secondly, to the other two members of the WhatsApp group in February and March 2018.

- 46.2 We accept Ms Sergi's evidence that Ms Brown did not tell her bad things about the claimant.
- 46.3 As to what Ms Brown told others in the WhatsApp exchanges, Ms Brown did not bad mouth the claimant. She noted that he was off sick, that he had brought a grievance against her and that she intended strictly to follow policy so as to avoid criticism. We consider that she would have treated any other person in such circumstances in the same way. There is nothing to suggest that she was acting in the way that she did because the claimant was Polish.
- 47. Ms Brown ignoring the claimant and not acknowledging him. This again is said to have taken place in the period October to November 2017 and is an allegation of direct race discrimination.
 - 47.1 We are satisfied that there was little contact between the claimant and Ms Brown prior to 9 November 2017 and afterwards Ms Brown was seeking to get to grips with a problem store.
 - 47.2 On balance, we reject the allegation of ignoring and being unfriendly on the basis that the allegation is that she did not deliberately, which is the claimant's case. She was clearly someone under great pressure and we are satisfied from the evidence relating to Mr Sergi, the Warrington store and the contemporaneous correspondence that the claimant was someone who was difficult to deal with as an employee.
 - 47.3 If there was such treatment by Ms Brown, we are satisfied that Ms Brown would have treated a hypothetical comparator in substantially the same way. Her treatment of the claimant was unrelated to his race.
- 48. We next turn to the failure to resolve the dispute with Ms Jephson, again an allegation of direct race discrimination.
 - 48.1 This is an allegation against both Mr Johnson and Ms Brown. We need to deal with the case against each separately.
 - 48.2 As regards Mr Johnson, he handed the matter of the complaints made both by Ms Jephson and the claimant to Ms Brown to deal with and was led to believe (both by her and by the absence of complaint to him from the claimant) that Ms Brown had indeed resolved matters. We are satisfied that he would have behaved in the same manner whoever had raised the complaints. Hence, the factual basis for the alleged discrimination is not established, even if it were disparate treatment could not be made out.

- 48.3 Ms Brown certainly failed to resolve the dispute. Whether she can be said even to have begun to try to resolve it is impossible for us to decide with any certainty on the available evidence. However, on balance, we conclude that she did seek to resolve it in the way explained in our findings of fact, namely by hoping that it would go away if she did nothing. We note that this was a wholly inappropriate way to conduct herself as a manager and we would expect, especially from the state of the branch, that Mr Johnson would have been more pro-active in this regard.
- 48.4 We consider that these observations and criticism of the respondent's management did not assist the claimant's case. Even if he can show unfavourable treatment here, he cannot show disparate treatment. There is an actual comparator, Ms Jephson. She had made allegations against the claimant shortly before he made his allegations against her. The core allegations relate to the same meeting. She is British. Her allegations were dealt with in exactly the same way both by Mr Johnson and most importantly, by Ms Brown.
49. We turn next to the allegation concerning the placing of fit notes either on a desk or in a drawer where they were generally available to members of staff. This is, again, an allegation of direct race discrimination.
- 49.1 That the fit notes were in a drawer (or on a desk) which others could have access to is not in dispute. The respondent does not dispute that this was bad practice. The claimant's case on this was always put rather tentatively: He told us that he did not know what happened to other fit notes and that he thought that the placing of his fit notes could have had something to do with his being Polish.
- 49.2 We have concluded that all fit notes were most probably dealt with in this inappropriate way, whether from the Polish claimant or from Polish or non-Polish members of staff.
- 49.3 In any event, there is no evidence to suggest that the claimant was treated in this way because he was Polish. In this regard we have kept in mind that in none of the contemporaneous documents (including the private WhatsApp exchanges which the participants urged each other to keep confidential) is any treatment of the claimant or any view expressed about the claimant linked to his nationality. The only time one finds such a link is by the claimant himself when conducting his grievance.
50. We now turn to the failure to pay Statutory Sick Pay on time, another allegation of direct race discrimination.
- 50.1 We note that the allegation before us, as it was at the grievance hearings, related to the period December 2017 to March 2018. Hence, we have separated two allegations. The first is that payments

were generally made late in that period and the second is that one payment (relating to two weeks in January) was made late.

- 50.2 There is no dispute that payments were regularly made late to the claimant, in the sense that payment was received after he would have expected to be ordinarily paid. This was because of the claimant's failure to produce fit notes on time, such that parts of the respondent's systems were "locked" by the time that they were received and a special process (described above) had to be used to unlock them. That would have happened to anyone who put in fit notes on the days that he did covering the periods that those fit notes covered.
- 50.3 The reasons why the particular payment in January was made late is more complex. Ms Brown did not send the required email to the payroll provider and the fact non-payment was not realised until the claimant complained, as a result of which he was paid.
- 50.4 It is clear that Ms Brown did send the required emails as regards various later payments and that she did this before her failure in respect of the January payment became clear. In all the circumstances we are satisfied that a British person in the claimant's position would have been treated the same as the claimant. In short, the reason for the treatment of the claimant in respect of the January payment was that Ms Brown made an error.
51. Next, we turn to the allegation concerning Mr Johnson failing to visit the claimant's store in the period August to November 2017 so as to avoid the claimant. This is an allegation not only of direct race discrimination but also of racial harassment.
- 51.1 The factual basis for those allegations is not established. Mr Johnson did visit the store on several occasions in the period in question and was otherwise in touch with the claimant who could, and did contact him by telephone, email and text.
52. We now turn to the cancellation of the transfer to the Stevenage store, an allegation of direct race discrimination.
- 52.1 The transfer was cancelled because of the claimant's unavailability over the busy Christmas period. Despite a poor start (with staff and Ms Sergi) the claimant would have been retained in that post (albeit on a trial basis) had he not been ill.
- 52.2 We note that the claimant accepts that this could not be an allegation of disability discrimination, because he asserts (and the respondent accepts) that he was disabled only from 1 January 2018. In any event, the reason for the transfer not going ahead was that he was unavailable for the Christmas period. We are satisfied that any

person who had been unavailable for any reason would have been treated in the same way.

53. We now turn to the first of the three allegations of disability discrimination. This relates to Ms Brown not setting up fit notes on the system thus leading to the claimant not being paid his sick pay on time.
 - 53.1 We have already dealt with this, both as regards the whole period from December through to March 2018 and the specific two-week period in January 2018 when considering the allegation of race discrimination.
 - 53.2 So far as the whole period is concerned, excluding the two weeks in January, there were delays but these were not consequent upon any failure to act by Ms Brown.
 - 53.3 So far as the January period is concerned, there was a failure on her part, but an accidental one unrelated to the claimant being disabled. We have explained our findings in that regard above.
54. The second allegation of direct discrimination relates to the sending of the three standard form letters in February 2018.
 - 54.1 Those letters were sent. This was done strictly in accordance with the respondent's procedures. The trigger for their being sent was the claimant's failure timeously to submit fit notes. Anyone who did not do so was, of course, absent without proper explanation so far as the branch systems were concerned and the letter would then be sent.
 - 54.2 The claimant says that his sister explained to Ms Brown that he was delayed in seeing his doctor, but we accept that this sort of information would not properly lead to a letter not being sent. The letter had a welfare as a potential disciplinary purpose. It sought to establish contact and to offer help if needed whilst warning of possible disciplinary consequences if this was an unjustified absence. Ms Brown was determined to follow policy to the letter in the circumstances (as her WhatsApp exchanges make clear) and we are satisfied that she would have treated anyone absent in similar circumstances (whether disabled or not) in exactly the same way.
55. We now turn to the allegation in respect of the WhatsApp remarks by Ms Brown in February 2018. These allegations are allegations both of disability related discrimination and disability related harassment.
 - 55.1 We have summarised all but one of the relevant remarks above, the other (in early March, rather than February) was that the claimant would not come back until his complaint was dealt with. Those participants in the WhatsApp chat agreed to keep the contents confidential.

- 55.2 Was Ms Brown's participation unfavourable treatment of the claimant? Her comments were factually accurate. The claimant was off sick, he was in breach of policy (as regards the provision of fit notes), he had put in a grievance against her and she intended to (and thereafter did) follow company policy to the letter, seeking advice as appropriate. So far as the March comment is concerned it is correct that the claimant did not intend to return until his complaint (ie his grievance) had been dealt with. We do not consider that the making by her of those statements, which is what the claimant relies upon, amounts to unfavourable treatment. Those statements are factually accurate statements and not unfavourable to the claimant.
- 55.3 However, we are mindful that they were said in the contents of comments by others to the effect that they disliked the claimant. They saw him as a "bully", as "unprofessional" and as a "twat". Does the fact that others made those comments and that Ms Brown's comments were made in their context make Ms Brown's comments unfavourable treatment of the claimant? We do not think that this follows. She did not endorse what others said, she simply set out a series of factual propositions and made her own comments upon the claimant, not adopting the views that they had set out.
- 55.4 If we are wrong in that regard, was that treatment of the claimant by Ms Brown "because of something arising in consequence of [the claimant's] disability"? The something arising in this case would be his absence and/or his putting in of a fit note. We do not consider the relevant link to be established. Anything which could be called unfavourable treatment in this case related not to his absence or his fit note, but to two ladies' views as to his character and conduct.
- 55.5 In any event, on the evidence we have heard, we consider that these **three** ladies did not know and could not reasonably have known of the claimant's disability. The respondent has conceded that he was disabled from 1 January 2018, but he has told us that he had completed his treatment in March and aimed to return once his grievance had been dealt with. The exchange in early March shows that these ladies understood that to be his position.
- 55.6 If we were wrong in all those regards, we would have found the respondent liable for the conduct of Ms Brown as the exchanges show that although these ladies were using their own mobiles phones, the group was intended to help to get the store back on track and the messages appear to have been sent whilst at work.
- 55.7 What of the harassment claim? For the reasons set out above, the factual substrata necessary to be established for this allegation is not made out. Even if it were, the conduct did not relate to the protected characteristic. Even if it did, the conduct was intended to be private, so lacked the required purpose. It is unclear when the claimant first saw the WhatsApp comments. From the notes of his discussion with

Ms Golby at the grievance appeal, it appears that he had got them from Ms Loveridge just prior to his being interviewed on 27 June. However, that interview contains no account by him of the impact of those comments upon him, either generally or particularly focussing on the comments made in the WhatsApp exchanges by Ms Brown. He gave no evidence to us in that regard. Hence, it is impossible for us to reach the conclusion that the remarks in question had the effect of violating his dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

56. For all of the reasons set out above each of the allegations of race and/or disability discrimination made by the claimant fails and this claim is dismissed in its entirety.

Employment Judge Andrew Clarke QC

Date: 19 February 2019

Sent to the parties on: 26 February 2019

.....
For the Tribunal Office